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HASLINA ALIAS v. SIRDI – 333 OTOMOBIL SDN BHD

HIGH COURT MALAYA, IPOH
SM KOMATHY JC
[CIVIL APPEAL NO: 12BNCVC-52-09-2015]
1 MARCH 2016

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HIRE PURCHASE: *Hire Purchase Agreement – Agreement for sale of car – Hirer purchased motorcar from vendor and obtained hire purchase loan from bank – Execution of hire purchase agreement with bank – Hirer refused to take delivery of motorcar and instructed bank not to release monies to vendor – Whether vendor could sue hirer based on sale and purchase agreement upon execution of hire purchase agreement*

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The appellant ('defendant') bought a new Toyota Camry ('the car') from the respondent ('the plaintiff'). The defendant signed a retail customer order and paid a deposit. The defendant then obtained a hire purchase loan from Bank Kerjasama Rakyat Malaysia Berhad ('Bank Rakyat'). Upon the approval of the hire purchase loan, the defendant signed an undated hire purchase agreement with Bank Rakyat. A letter of undertaking was thereafter issued by Bank Rakyat to the plaintiff informing its readiness to disburse the loan provided that the defendant signed the delivery note upon taking delivery of the vehicle and subject to other conditions, whereupon, the defendant was registered as the owner of the car with Bank Rakyat's ownership claim endorsed on the registration card. The defendant, however, refused to collect the car upon discovering that some particulars in the vehicle invoice had been amended without the defendant's consent and instructed Bank Rakyat not to release any monies. The plaintiff therefore commenced an action against the defendant in the Sessions Court and claimed for damages for breach of the sale and purchase agreement. Citing the case of *Ahmad Ismail v. Malaya Motor Co & Anor* (*Ahmad Ismail*'s case), the defendant contended that the plaintiff could not sue the defendant based on the sale and purchase agreement between them upon the execution of a hire purchase agreement by the latter with a finance company. On the other hand, the plaintiff, among others, argued that it was entitled to sue the defendant for damages for breach of the sale and purchase agreement price as the hire purchase agreement had been terminated. The Sessions Court held that the *Ahmad Ismail*'s case did not apply to the present facts and allowed the plaintiff's claim. Hence, the present appeal.

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Held (allowing appeal with costs):

(1) The contractual relationship between a hirer and a car dealer ceases to exist upon the execution of a hire purchase agreement. The finance company becomes the owner of the vehicle and pursuant to the terms of the hire purchase agreement, is liable to the hirer. Therefore, the

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plaintiff could not maintain a suit against the defendant. The Sessions Judge had erred in deciding that the principle in *Ahmad Ismail*'s case did not apply to the present case. (paras 11 & 15)

(2) The instruction by the defendant to Bank Rakyat not to release payment to the plaintiff could not amount to termination. An election to avoid a contract is not complete until the decision has been communicated to the other side. There was no evidence that there was such communication to Bank Rakyat. Further, following the execution of the hire purchase agreement, the car was registered in the name of the defendant and the registration card was endorsed with an ownership claim by Bank Rakyat. This did not sit well with the plaintiff's allegation that there was a termination of the hire purchase agreement. (paras 13 & 14)

(3) Pursuant to cl. 5 of the Retail Customer Order, the plaintiff was entitled to forfeit only the booking fee and claim for the losses and expenses incurred by reason of the defendant's default. It was not clear why the balance purchase price was allowed as damages having regard to the fact that the car was still in the plaintiff's possession. Thus, the Sessions Court had also erred in ordering the defendant to pay damages in the sum of RM143,800. (paras 15 & 17)

Case(s) referred to:

Ahmad Ismail v. Malaya Motor Co & Anor [1973] 1 LNS 1 FC ***(refd)***
Ahmad Ismail v. Malayan Motor Co & Anor [1972] 1 LNS 5 HC ***(refd)***
Heng Long Motor Trading Co v. Osman Abdullah [1994] 3 CLJ 754 HC ***(refd)***
Ong Siew Hwa v. UMW Toyota Motor Sdn Bhd & Anor [2014] 4 CLJ 373 HC ***(refd)***
Perfect Kam Hung Sdn Bhd v. Cheah Tai Hoe & Anor [2011] 1 LNS 1580 HC ***(refd)***

For the appellant - G Darshan Singh (Wan Rohimi Wan Daud with him); M/s Tengku Amalin' A-Ishah Putri, Faizi & Wan Rohimi
For the respondent - Fauziana Mohd Bharil; M/s Ng Choo Beng R Naidu & Partners

[Editor's note: Appeal from Sessions's Court; Civil Action No: A52NCC-5-3-2015 (overruled).]

Reported by Sandra Gabriel

JUDGMENT

SM Komathy JC:

[1] The sole issue in this appeal is whether a car dealer can maintain an action against the purchaser/hirer based on the sale and purchase agreement between them upon the execution of a hire purchase agreement by the latter with a finance company. The learned Sessions Court Judge answered the question in the affirmative.

[2] A little background assists in understanding the factual matrix of this appeal. The defendant (the appellant here) and her husband attended the plaintiff's (the respondent here) showroom to buy a new Toyota Camry

A model 2.0(G) ('the car'). Following a brief discussion with a sales officer there, the defendant agreed to buy the car for the sum of RM159,800 and signed a retail customer order. The defendant agreed to pay a deposit of RM16,000. He was given a rebate of RM10,000 for National Day promotion leaving a balance of RM6,000. He has paid a deposit of RM3,564.

B **[3]** The defendant then obtained a hire purchase loan from Bank Kerjasama Rakyat Malaysia Berhad ("Bank Rakyat") for RM143,800. Upon the approval of the hire purchase loan, the defendant signed an undated hire purchase agreement with Bank Rakyat. A letter of undertaking dated 11 August 2014, was thereafter issued by Bank Rakyat to the plaintiff C informing its readiness to disburse the loan provided that the defendant has signed the delivery note upon taking delivery of the vehicle and subject to other conditions. Whereupon, the defendant was registered as the owner of the car with Bank Rakyat's ownership claim endorsed on the registration card.

D **[4]** The defendant refused to collect the car when he discovered that some particulars in the vehicle invoice had been amended without his consent and instructed Bank Rakyat not to release any monies. Whereupon, the plaintiff sued the defendant for damages for breach of contract and succeeded in the Sessions Court.

E **[5]** It seems to me that the issue before this court is similar to that faced by the Federal Court in *Ahmad Ismail v. Malaya Motor Co & Anor* [1973] 1 LNS 1; [1973] 2 MLJ 66. There, the hirer sued both the car dealer and the finance company for damages for breach of contract on the ground that his car was seized by the police on suspicion of being a stolen car. In F dismissing the hirer's appeal against the dismissal of his claim against the car dealer, Suffian FJ explained:

> The questions to be determined in this appeal are as follows. After the execution of the hire purchase agreement between the plaintiff and the finance company did there remain any contractual relationship between G the plaintiff and the car dealer so that the plaintiff has a claim against him? As between the plaintiff and the finance company, did the seizure by the police of the car in the particular circumstances of this case constitute a breach of the implied condition under section 6(1)(b) by the finance company so as to entitle the plaintiff to rescind the hire-purchase agreement and claim damages for that breach?
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> H The first ground of appeal concerns only the first defendant. It is said that the learned appellate judge was wrong in holding that there remained no contractual relationship between the plaintiff and the first defendant. It is said that despite the existence of the hire-purchase agreement there still remained a contractual relationship between the two of them and that the I learned appellate judge should have held that the first defendant had only assigned his rights in the car to the finance company.

> We regret we cannot accept this argument. It is true that by exhibits P1 and P2 there was a sale by the car dealer of the car to the plaintiff on certain conditions. But ultimately these documents were superseded by the hire-purchase agreement exhibit P3 and from the language of this document it is plain that the car dealer completely faded out of the picture and the only contract that remained then was between the plaintiff and the finance company, and accordingly the plaintiff has no claim against the car dealer.

[6] In *Ong Siew Hwa v. UMW Toyota Motor Sdn Bhd & Anor* [2014] 4 CLJ 373, the hirer brought an action against the finance company and the car dealer. Ahmad Nasfy JC (as he then was) dismissed the claim against the car dealer on the basis that the Federal Court decision in *Ahmad Ismail* rendered his claim unsustainable.

[7] The plaintiff disputed that *Ahmad Ismail* (*supra*) is authority for the proposition that a car dealer cannot sue the hirer on the sale transaction entered into between them prior to the hire purchase agreement. It was contended that the hirer did not succeed in *Ahmad Ismail*'s case as his cause of action against the dealer was founded on the hire purchase agreement and not the sale transaction. To support its argument, the plaintiff referred to the decisions in *Heng Long Motor Trading Co v. Osman Abdullah* [1994] 3 CLJ 754 and *Perfect Kam Hung Sdn Bhd v. Cheah Tai Hoe & Anor* [2011] 1 LNS 1580, Mohamad Ariff Md Yusof.

[8] I turn now to examine the two authorities cited by the plaintiff. In *Heng Long Motor Trading Co* (*supra*), the finance company and the hirer brought an action against the car dealer when the car was seized by the Customs and Excise Department. The learned magistrate allowed the hirer's claim but dismissed the claim by the finance company. The car dealer appealed but was unsuccessful. In dismissing the appeal, Chong Siew Fai J elaborated:

> I am fully aware that in *Ahmad Ismail v. Malayan Motor Company & Anor* [1973] 2 MLJ 66 FC, the plaintiff/hirer, like the customer in our case, himself paid the initial part of the price by surrendering his own car and in cash, and had the balance raised by entering into a hire-purchase agreement with a financial company. Unlike in our present case where the customer and the finance company jointly sued the dealer, in *Ahmad Ismail*'s case, *supra*, the plaintiff/hirer sued both the car dealer and the finance company. Another important feature in *Ahmad Ismail*'s case is that the Federal Court did not hold that there was no sale between the car dealer and the plaintiff/hirer. It held that there was such a sale but that it was ultimately superseded by the hire purchase agreement between the plaintiff/hirer and the finance company and accordingly ruled that the plaintiff's claim against the car dealer failed.
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> There is, in my view, good reason for the above decision because a perusal of the judgement will show that in that case the plaintiff sued both defendants for breach of contract and the alleged breach was that of a

A condition implied by s. (1)(b) of the Hire Purchase Act 1967. In other words, in *Ahmad Ismail*'s case the plaintiff founded its action upon the Hire Purchase Act 1967, whereas in the instant case, the plaintiff relied on the Sale of Goods Act 1893 though the Act was not specifically pleaded as such. For the above reasons, I agree with the view of the learned trial Magistrate that *Ahmad Ismail*'s case, *supra*, is not applicable to B our present case.

[9] With respect, I am unable to agree with the view expressed by Chong Siew Fai J that in *Ahmad Ismail* the hirer's claim against the car dealer was based on the hire purchase agreement. This is evident from the judgment of Mohamed Azmi J (*Ahmad Ismail v. Malayan Motor Co & Anor* [1972] 1 LNS C 5; [1973] 1 MLJ 117). His Lordship dealt with the appeal in *Ahmad Ismail* at the High Court upon the Sessions Court Judge dismissing the claim by the hirer. This is what His Lordship said:

> There are two principal grounds in this appeal. On the first ground it is argued that the learned Senior President erred in law in holding that there D was a sale of the Morris car by the first defendant to the second defendant and that there was no contract of sale between the plaintiff and the car dealer ...
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> The following observation by Sellers LJ in *Car and Universal Finance Co, Ltd v. Caldwell* [1964] 1 All ER 290 at p 297 CA, which had been referred to E by the learned Senior President, would tend to support the contention of counsel for the first defendant that there was no contract of sale between the plaintiff and the dealer:
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> > No doubt car dealers are agents for some purposes of the finance companies with whom they deal in relation to transactions with F the hirer; but the basic transaction between car dealer and finance company is one of sale and purchase.
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> Under the circumstances, I see no good reason to disturb the order of the learned Senior President in dismissing the plaintiff's claim against the car dealer with costs. I agree with the learned President's conclusion that the plaintiff's right, if any, was only against the finance company under the G hire-purchase agreement.

[10] That takes me to the second case. In *Perfect Kam Hung Sdn Bhd*, the facts show that the hirer brought a claim against the car dealer for refund of monies. The hire purchase agreement was terminated at the request of the car dealer prior to the filing of the action. The hirer succeeded in his claim. H

[11] For the reasons stated, I am unable to agree with the plaintiff that he can bring a suit against the defendant on the sale transaction. *Ahmad Ismail* is clear authority that the contractual relationship between a hirer and a car dealer ceases to exist upon the execution of a hire purchase agreement as I thereafter the finance company becomes the owner of the vehicle and pursuant to the terms of the hire purchase agreement is liable to the hirer if the vehicle is found to be defective or seized by the police. It follows from

there that neither the hirer nor the car dealer can sue each other on the sale and purchase agreement. I therefore disagree from the view expressed by the Sessions Court Judge that the principle in *Ahmad Ismail* does not apply to the present case.

[12] In the alternative, the plaintiff contended that even if the principle in *Ahmad Ismail* was applicable to the facts here, it was nevertheless entitled to sue the defendant for damages for breach of the sale and purchase agreement price as the hire purchase agreement here had been terminated. On termination, the sales agreement between it and the defendant was revived. The following facts underpin the plaintiff's contention that there was termination of the hire purchase agreement:

(a) There was no payment been made by Bank Rakyat to the plaintiff.

(b) The hire purchase agreement was incomplete and not finalised at the material time.

(c) The defendant had never paid any instalments to Bank Rakyat.

(d) The defendant instructed Bank Rakyat to stop the payment to the plaintiff.

[13] I do not agree with the plaintiff's argument that the facts stated in the preceding paragraph show there was termination. The instruction by the defendant to Bank Rakyat not to release payment to the plaintiff cannot amount to termination. It is trite that an election to avoid a contract is not complete until the decision has been communicated to the other side. There is no evidence that there was such communication to Bank Rakyat.

[14] There is another compelling reason as why the plaintiff's argument that there was termination cannot succeed. As noted earlier, following the execution of the hire purchase agreement, the car was registered in the name of the defendant and the registration card was endorsed with an ownership claim by Bank Rakyat. This does not sit well with the plaintiff's allegation that there was a termination of the hire purchase agreement.

[15] I would allow the appeal on this issue and that is sufficient to decide the appeal in the defendant's favour. However, in the event, I am wrong in my conclusion that the plaintiff cannot maintain a suit against the defendant, there is yet also another ground on which the Sessions Court Judge had erred. It relates to the order made by him that the defendant pays the plaintiff damages in the sum of RM143,800. It is not clear why the balance purchase price was allowed as damages having regard to the fact that the car is still in the plaintiff's possession. In this context, it is fundamental to note that the plaintiff's cause of action against the defendant is for damages for breach of the sale and purchase agreement and not specific performance of the agreement.

[16] Clause 5 of the Retail Customer Order issued by the plaintiff to the defendant was in these terms:

> If the customer shall fail to take and pay for the vehicle within seven (7) days of the notification as aforesaid the Company shall be at liberty to treat the contract as repudiated by the customer and thereupon the booking fee (s) paid herein shall be irrevocably forfeited by the company without prejudice to the company's right to recover from the customer by way of damages any loss or expenses which the company may suffered or incur by reason of the customer default.

[17] The terms of cl. 9 are clear and give the plaintiff the option to forfeit the booking fee upon the default of the defendant to take the car and make the payments. The plaintiff having exercised this option, is not entitled to seek the balance of the purchase price under the sale transaction. Pursuant to cl. 5, the plaintiff is entitled to forfeit only the booking fee and claim for the losses and expenses incurred by reason of the defendant's default. The sum of RM 143,800 awarded to the plaintiff was made without regard to the plaintiff's duty to mitigate damages. No evidence was led by the plaintiff as to why the car was not sold by the plaintiff to mitigate its damages. The plaintiff ought to have sought a court order for the cancellation of the endorsements made on the registration card and proceeded to sell the car.

[18] In conclusion, there are two bases for concluding that the appeal ought to be allowed. First, the hire purchase agreement precludes the plaintiff from suing the defendant, and secondly, the damages awarded to the plaintiff are in breach of cl. 5. The appeal is accordingly allowed with costs of RM3,000 as agreed by the parties.